

STAMP AND RETURN

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, DC 20554

In the Matter of:

Wireless Telecommunications Bureau Seeks  
Comment on National Railroad Passenger  
Corporation (Amtrak) Request for Waiver of Certain  
Part 80 Automated Maritime Telecommunications  
System (AMTS) Rules to Implement Positive Train  
Control

DA 11-322 RECEIVED - FCC

MAR 10 2011

Federal Communications Commission  
Bureau / Office

**OPPOSITION TO PETITION FOR RECONSIDERATION  
AND MOTION TO DISMISS**

The National Railroad Passenger Corporation ("Amtrak"), by its attorneys, hereby opposes the Petition for Reconsideration and Motion to Dismiss ("Petition") submitted on February 25, 2001 in response to the captioned Public Notice<sup>1</sup> by the following companies controlled by Warren C. Havens – Skybridge Spectrum Foundation, ATLIS Wireless LLC, V2G LLC, Environmental LLC, Verde Systems LLC, Telesaurus Holdings GB LLC, and Intelligent Transportation & Monitoring Wireless LLC (collectively "Petitioners"). As discussed below, the Petition should be summarily dismissed as defective.

**I. THE PETITION SHOULD BE DISMISSED AS DEFECTIVE**

Petitioners seek reconsideration of the above-captioned Public Notice pursuant to Section 405 of the Communications Act of 1934 (the "Act") and Section 1.106 of the Commission's rules.<sup>2</sup> Neither provision, however, authorizes reconsideration of a Public Notice merely seeking comment on a waiver request.

<sup>1</sup> Wireless Telecommunications Bureau Seeks Comment on National Railroad Passenger Corporation (Amtrak) Request for Waiver of Certain Part 80 Automated Maritime Telecommunications System (AMTS) Rules to Implement Positive Train Control, DA 11-322, Public Notice (WTB rel. Feb. 18, 2011) ("Public Notice").

<sup>2</sup> Petition at 2; *see* 47 U.S.C. § 405; 47 C.F.R. § 1.106(a).

Section 405 of the Act confers a statutory right to petition for reconsideration upon a “person aggrieved or whose interests are adversely affected. . . .” by “an order, decision, report or action.”<sup>3</sup> Consistent therewith, Section 1.106 of the Commission’s rules states in relevant part:

Petitions requesting reconsideration of a final Commission action will be acted on by the Commission. Petitions requesting reconsideration of other final actions taken pursuant to delegated authority will be acted on by the designated authority or referred by such authority to the Commission. . . . Petitions for reconsideration of other interlocutory actions will not be entertained. . . .<sup>4</sup>

Here, there was no “final action” taken by the Wireless Telecommunications Bureau and, therefore, the Petition cannot be entertained.<sup>5</sup> It is well established that documents requesting public comment do not constitute “final action” and petitions for reconsideration filed against such documents will not be granted. As the Commission has noted:

Generally, petitions for reconsideration may not be acted upon until a final action has been taken. *See* Sections 1.106, 1.407, 1.425 and 1.429 of the Commission’s Rules. *In contrast to the issuance of a Notice where action is merely proposed, a Report and Order may take definitive action affecting an existing licensee.* In the present case, the denial of an Order to Show Cause to petitioner, based on our discretionary authority contained in Section 316 of the Communications Act of 1934, as amended, was not final. The conclusion that petitioner did not set forth sufficient reasons to justify the action requested at that time does not however preclude it from filing comments to the Notice and from setting forth the appropriate arguments to convince us that such a modification would serve the public interest. Nor would we then be prevented from granting such modification if, based on such

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<sup>3</sup> 47 U.S.C. § 405.

<sup>4</sup> 47 C.F.R. § 1.106(a)(1). The omitted language permits petitions for reconsideration in one situation not applicable here – hearing designation orders with an adverse determination regarding the petitioner’s participation in the proceeding. *Id.*

<sup>5</sup> Petitioner certainly is not aggrieved for purposes of Section 405 without a final order.

showing we believed it to be proper. Seen in this manner it is clear that no final action has been taken. Any further discussion of the merits in this case should await consideration of the filings in response to the Notice. Of course, if petitioner is not satisfied after final action is taken, it may then file an appropriate petition for reconsideration.<sup>6</sup>

Thus, the appropriate time for seeking reconsideration would be after a final order addressing the requested waiver, not before the Commission has rendered a decision on the matter.

Consistent with the defects referenced above, the Petition should be denied because entertaining petitions for reconsideration filed in response to public notices seeking comment would promote "mischief." As the D.C. Circuit noted in interpreting the meaning of "final order" for purposes of filing an appeal:

Congress explicitly limited our review to agency orders. If we were to construe that term to encompass every agency move which might cause someone future harm, we would in effect be reading the congressional limitation out of existence by permitting review whenever there existed a petitioner with a motive for seeking it. . . . Such a reading would be entirely implausible. *It would cause considerable mischief.* It would in effect permit the Courts of Appeals at the whim of parties not otherwise aggrieved to scrutinize administrators' passing remarks, overturn their subsidiary factual determinations, and stalk their every step along alternative paths of reasoning. The result would be a heavy burden on court and agency alike.<sup>7</sup>

Based on the foregoing, the Public Notice seeking comment on Amtrak's waiver request does not constitute final action and, therefore, the Petition should be dismissed.

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<sup>6</sup> *Amendment of Section 73.606(b), Table of Assignments, Television Broadcast Stations (Riverside and Santa Ana, Cal.)*, Docket No. 20727, *Memorandum Opinion and Order*, 62 F.C.C.2d 752, 753 (1976) (emphasis added); *accord Modification of FM Broadcast Station Rules to Increase the Availability of Commercial FM Broadcast Assignments*, BC Docket No. 80-90, *Memorandum Opinion and Order*, 78 F.C.C.2d 1232, 1233 (1980).

<sup>7</sup> *AT&T v. FCC*, 602 F.2d 401, 409 (D.C. Cir. 1979) (emphasis added).

## **II. AMTRAK HAS NOT ENGAGED IN ANY IMPERMISSIBLE EX PARTE COMMUNICATIONS**

In addition to seeking reconsideration of the Public Notice, Petitioner alleges that Amtrak has engaged in impermissible ex parte communications. No support is provided for this claim. Instead, Petitioner theorizes that because (i) Amtrak is negotiating with Maritime Communications/Land Mobile, LLC ("MCLM") regarding the potential acquisition of licenses and (ii) there is a restricted proceeding pending regarding MCLM's candor, any communications between Amtrak and the FCC must have been impermissible.<sup>8</sup> This allegation is baseless.

For purposes of the ex parte rules, a presentation is defined as "a communication directed at the merits or outcome of a proceeding."<sup>9</sup> Amtrak has not engaged in any such communications with FCC decision makers with regard to the restricted proceeding referenced by Petitioner.

## **III. OTHER MATTERS**

The Petition includes four pages of discussion addressing the merits of the waiver request that is the subject of the Public Notice.<sup>10</sup> Given that the deadline for replying to comments addressing the waiver request is March 21, 2011, Amtrak will defer addressing those issues until that time.

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<sup>8</sup> Petition at 4-5.

<sup>9</sup> 47 C.F.R. § 1.1202(a).

<sup>10</sup> Petition at 6-9.

## CONCLUSION

For these reasons, the Petition should be denied.

Respectfully submitted,

NATIONAL RAILROAD PASSENGER  
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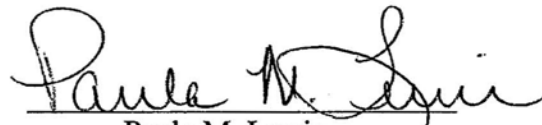
March 10, 2011

**CERTIFICATE OF SERVICE**

I, Paula M. Lewis, hereby certify that on March 10, 2011, copies of the foregoing  
Opposition were served by United States Mail, first class postage prepaid on the following:

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